VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., EDITOR.
FRANK MOORE AND JAMES F. MINOR, ASSOCIATE EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

The Virginia State Bar Association.

The annual meeting of the Virginia State Bar Association will be held at the Homestead Hotel, Hot Springs, Va., on August 8th-10th. The annual address will be delivered by Mr. Helm Bruce of Louisville, Ky.—one of the acknowledged leaders of the Kentucky Bar. Papers will be read by Judge A. W. Wallace of Fredericksburg, Mr. Walter H. Taylor of Norfolk, and Prof. R. C. Minor of the University of Virginia.

No social event in the Commonwealth is more enjoyable and enjoyed than these annual gatherings of the Bar Association, and the papers read and addresses delivered are of distinct and marked value.

The actual force of the association itself has never been exerted so as to make itself felt upon the legislative branch of the State Government. With the exception of elevating the standard of admittance to the Bar there has been no measure put upon the statute books which can be traced to the efforts of this body.

And yet who can estimate the work it might do, if only with concentrated effort it should attempt to institute legal reform—in procedure, practice and betterment of our statutes? Intensely conservative, all attempts at reform in any of these directions have been met either with cold indifference or active opposition. This conservatism might be further shocked if some member should at some future day—may it not be distant—propose a committee to examine into the English Barrister's Benevolent Association. This is an association of barristers who, pay in small sums annually, and thus establish a fund to aid old barristers and orphan children of barristers.

During the last year it gave away in aiding the former classes and educating the latter, over fifteen thousand dollars. Mr.

Justice Grantham as a thank offering for having completed twenty-five years on the Bench sent his check to the Association for one hundred guineas—about five hundred dollars. Might not the Bar Association, modelling itself upon this English Barrister's charity, become a power for good hard to be overestimated?

Tax Sales.

At the term of our Supreme Court of Appeals held at Wytheville last month two important decisions were handed down relating to the validity of tax deeds. In Coles' Heirs *v.* Jamerson, decided June 8th, some interesting questions were raised. The land in dispute was held by the defendant under a tax deed from the Clerk, dated February 10th, 1896. This deed was attacked, 1st: on the ground that the land was assessed in the name of T. M. Coles and returned delinquent for several years after his death, when it should have been charged to his estate. 2nd. Because the land was registered in the white list and Coles was a colored man. 3rd. Because the tax deed did not recite an adjournment of the sale. And 4th. Because the deed failed to show there was a report by the County Treasurer of the sale and the confirmation of such report and sale.

The court disposed of the first three objections to the validity of the deed in commendably short order. Coles left a will which was probated in Prince Edward County, where he resided, and no copy was ever placed on the records in Buckingham. The court quoted § 473 of the Code, declaring that land correctly charged to one person shall not afterwards be charged to another person without *evidence of record* that such charge was proper, and Usher's Heirs *v.* Pride, 15 Grat. 190, which held the entry in the name of the patentee (who had died) concluded "the heirs and purchasers claiming under them" and that they were forfeited for the delinquency in failing to pay the taxes charged thereon.

The court held that § 464 requiring separate lists for white and colored persons was purely a statistical measure and could not affect the validity of the assessment. The failure to note an adjournment of the sale in the deed was held to amount to

nothing in view of the fact that the deed sets out that the sale was made "after due advertisement as required by law."

But the failure in the deed to recite that the county treasurer made a report of the sale, or that the sale was confirmed by the court, or that it was recorded as required by §§ 642, 645 and 662, was held fatal, the court quoting with approval *2nd Minor on Real Property*, § 1383, the "mystic seven" things requisite to make a tax deed valid being the recordation in the clerk's office of the following:

"1. The *listing* and *valuation* of the land by the assessors and commissioners of the revenue, as contained in their returns to the court or the clerk;
2. The *levy* of the tax by the commissioner of the revenue;
3. The *list of delinquent taxes,* returned by the county or city treasurer, recorded in the clerk's office in the 'delinquent land book;'
4. The *treasurer's report of sales,* recorded in the clerk's office in the 'delinquent tax book;'
5. The *notice or advertisement* of the sales, which appears by way of *recital in the treasurer's report of sales;*
6. The order of court confirming the sale;
7. The surveyor's report, with plat and certificate showing the metes and bounds of the tract sold, the names of adjoining owners, and giving such further description of the land as will serve to identify it and enable the clerk to describe it properly in the tax deed."

An interesting and novel point was made in this case. The executrix under the will of Coles was ordered to sell the testator's real estate six months after his death. The executrix dying, the sheriff of Prince Edward qualified as *administrator,* but not as administrator *with the will annexed.* He united in the suit with Coles' heirs and on cross appeal the supreme court decided that he was not a proper party and that the action should have been abated as to him. There can be no question that the executor being merely directed to sell the land had only a power of sale and no interest therein. 18 Cyc. 302, &c., 11 Am. & Eng. Enc. (2nd Ed.), § 1035; Croswell on Executors and Administrators, § 330, and the administrator, even if he had been appointed *cum testamento annexo,* would have had no interest in the land. But our court goes on further and questions the validity of such an appointment. It refers to Ewing *v.* Sneed, 5 J. J. Marshall (Ky.)

459, where it was held that such an appointment was *absolutely void*, the omission of the words "with the will annexed" being necessary to give validity to the appointment of an administrator of one dying with a will which had been probated.

Of course so much of the opinion as questions the validity of such an appointment may be considered as *obiter*, but the question is one of interest and some little importance. We do not believe the decision in Ewing *v.* Sneed ought to be followed. In Thompson *v.* Meek, 7 Leigh 419, a court of probate received proof of a will, recorded it and six months afterwards granted administration c. t. a., it not appearing that the executors named in the will had renounced. Our Supreme Court held that the failure to state such renunciation upon the record did not make the grant of administration *void*: And in Royall *v.* Eppes, 2 Munf. 479, it was held that an administrator appointed and qualified by a court of competent authority is the lawful representative of the personal estate until his appointment is rescinded, although another person had a superior right to qualify.

And in more than one case it has been held that every administrator after the first is an administrator *de bonis non* in fact and it is not important it should so appear of record.

Veach *v.* Price, 131 U. S. 293, 33 L. Ed. 163; Steen *v.* Bennett, 24 Vermont, 303; Ex parte Maxwell, 37 Alabama, 362.

Whilst these cases are not directly in point they are certainly persuasive authority against such an appointment being *absolutely void.* The omission in the record of appointment of the words "with the will annexed," is of not much more importance than the omission of the *de bonis non* in the order appointing a second administrator.

The second case upon tax deeds was Gordon *v.* Joyner, decided the same day. Here the court held that a tax deed executed by the clerk after two years from the date of the sale was void because executed before the purchaser had given the required notice under Section 655, and that such failure was not cured by Section 661. The court holds that the purchaser must obtain his deed in accordance with Section 665—that is, his deed must be executed by the clerk (unless the clerk be the purchaser) after two years from the sale and after the purchaser has given the notice required by that section, and that failure to give such no-

tice was a violation of the law, and to hold that Section 661 cured it would be to allow the purchaser to take advantage of his own negligence or wrong. Both these cases are reported in this number, see ante, pp. 281, 286.

Constitutional Safeguards.

When our constitutions were in the making the criminal laws of both England and this country were barbarous in the extreme. The prisoner could not testify—was not allowed counsel in many cases—and the whole power of the government was thrown against the unfortunate creature in the dock. No wonder then that every possible safeguard was attempted to be thrown over any one accused of crime, by the lovers of liberty and human rights. Many of those safeguards have now become stumbling blocks in the way of justice. The reason for them no longer exists; but the courts adhere to them as strongly and lean in their favor as much as if every one of the old laws and customs remained in force. That the courts must rigidly adhere to them as long as they form parts of our law, no one would for a moment question, but that they should extend them in the slightest degree is much to be deprecated.

One constitutional provision, common alike to the Constitution of the United States and the various states of the Union, provides that no person shall be compelled in a criminal case to be a witness against himself—a provision than which none could be more valuable, but which has been construed in many very remarkable ways. A late decision of the Appellate Division of the Supreme Court of the State of New York, seems to us to have stretched the construction of this law to the limit of absurdity. The Highway Law of New York provides that any operator of an automobile, if he fail to return to the scene of any accident caused by him and leave his name and address with the police shall be guilty of a felony. Rosenheim, whose machine killed one Grace Hough on Pelham Parkway in New York some time ago, and who sped on his way regardless of the accident, was tried and acquitted of murder, but indicted under this Highway Law for his failure to return and give his name and address. A demurrer to the indictment on the ground that the law violated

the constitutional provision aforementioned was over-ruled in the trial court; but the Appellate Division reversed the lower court, sustained the demurrer and dismissed the indictment—Judge Ingraham dissenting. If ever there was an instance in which construction was stretched to the limit it was in this case, in our humble judgment. Judge Ingraham, we think, made an unanswerable argument against the views of the majority when he said:

> "The use of motor vehicles has created a new condition in which those using the streets are subjected to serious dangers. The Legislature, to protect the citizens, has made it the duty of one causing an accident to stay at the place of the accident and give proper notice to the police. Certainly common humanity would impose such a duty, and I can not believe that a statute which imposes and enforces it would violate the constitution of this State."

In marked contrast to this decision we find the Supreme Court of the United States in the case of Baltimore & Ohio Ry. Co. *v.* Interstate Com. Com. Opinions U. S. Supreme Court, July 1st, 1911. No. 13 Advance Sheets, p. 623, holding that the secretary or similar officer of a carrier subject to the act of March 4th, 1907 regulating hours of labor of employees, can not claim a personal privilege against self recrimination to justify a refusal to comply with an order of the Interstate Commerce Commission requiring such official to make monthly reports under oath showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or where there has been no excess service, to make a separate oath to that effect in lieu of the form to be used in detailing excess service, that the carrier itself can not claim a privilege against self recrimination to justify its refusal to have its secretary or similar officer refuse to make such a report.

Malicious Prosecution —Probable Cause.

In the case of Saunders *v.* Baldwin, decided by our Supreme Court of Appeals June 8th, 1911, and reported ante, p. 293, it is held that in an action for malicious prosecution a judgment of conviction by a justice or other trial court having jurisdiction of the case, which is re-

versed upon appeal or writ of error and the accused acquitted, should be held to be conclusive evidence of probable cause, unless it be shown that it was procured by the defendant through fraud or by means of testimony which he knew to be false.

This decision seems to be a reversal of the case of Evans *v.* Atlantic Coast Line Ry., 105 Va. 72, 53 S. E. 3, reported with annotation in XII, Va. Law Reg. 153, though this last case is not cited in the opinion. In the Evans case, A. H. Evans was arrested for theft by agents of the A. C. Line Ry. and convicted by a justice of the peace. He took an appeal, which was continued from time to time and finally dismissed. There is no evidence in this last case that there was any fraud in the procurement of the conviction by the defendant railway, or that it was obtained by testimony which was known to be false. That the detective who got up the evidence for the railway company was exceedingly careless and that his own testimony in the suit for malicious prosecution was contradicted, is true, but nowhere in the case is an evidence of fraud or that the detective knew the testimony was false. Yet the court sustained a verdict for two thousand dollars against the defendant in that case.

The Court in the Saunders & Baldwin case says that the precise question involved in that case had never been raised and passed upon by the court in any case officially reported. It seems to us that the *opinion* in Evans *v.* A. C. L. Ry. Co., supra, certainly was strong argumentative authority to support the decision in Saunders *v.* Baldwin, though the two decisions seem to us to be conflicting.

In the Saunders case a conviction by a magistrate although reversed on appeal was held to be probable cause. Why was not the conviction by the magistrate in the Evans case, which was dismissed on appeal, equally probable cause, there being neither fraud or knowledge of false testimony in either case by means of which the conviction was obtained?

Buchanan, J., dissented in Evans *v.* Atlantic Coast Line Ry. His dissenting opinion seems to be justified by the decision of the court in the case under discussion. See annotation to the case above cited, in which we approved the dissenting opinion.

Garnishment.

The case of Freitas *v.* Griffith, etc., reported ante, p. 291, decided by our Supreme Court of Appeals June 8th, 1911, is one of "first intention" in this State, and whilst in our judgment absolutely correct and just, seems to reach a different conclusion from most of the decisions quoted in the text books. The court holds that under Sections 3609 to 3613 of our Code, inclusive, and by the terms of these enactments the court can make no order in proceedings on suggestion against the party summoned unless he is found either to be indebted to the execution debtor or to have estate of such debtor in his possession. The statute is held not to contemplate or operate upon estate in possession of the garnishee to which he has title, but only estate of the execution debtor for the recovery of which he may maintain an action in his own behalf against the holder; and in such a proceeding the court has no power to set aside an alleged fraudulent transfer of personal property from the debtor to his wife.

Our court follows Swann *v.* Summers, 19 W. Va. 115, which in construing sections of the Code of that State substantially the same as the Virginia Statute, held the views which our own court now holds.

A careful reading of the sections of the Code above referred to makes it plain that our court could not well have decided other than it did, but the general rule seems otherwise. See 20 Cyc. 663, 14 Am. & E. Enc. 790. We have not had an opportunity to examine all the statutes under which the numerous decisions quoted in these books are made, but no statutory provisions requiring a divergence are mentioned except the Missouri statute which expressly allows a creditor to reach by garnishment all moneys which the garnishee may have by reason of the sale of the property which has been conveyed to him in fraud of the creditors of the principal defendant, and the Michigan statute which holds the property fraudulently conveyed, or proceeds if same has been sold, liable. We have never believed our statute applied in cases of this character, though the matter was one by no means free of doubt. We are glad to have it definitely settled.

The United States Safety Appliance Act.

The opinion of Judge Barley in the case of Hawkins *v.* Southern Ry. Co., reported in this number is we believe the first time this United States law has been appealed to in the state courts. Judge Barley's decision is merely upon the question of pleading. Within the last few months this Safety Appliance Act of March 2nd, 1893 has been twice before the Supreme Court of the United States. The case of Schlemmer *v.* B. R. & Pittsburg Railway Co., May 15th, 1911, was before the court once before, the Supreme Court having reversed the Pennsylvania Supreme Court (207 Pa., page 198) which had decided that the plaintiff could not recover damages because of his contributory negligence. The Supreme Court of the United States, however, not passing upon this point, but reversing the case upon the ground that, as the record then stood, to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefits of the statute which made the assumption of risk no longer a defense. We commented on the action of the Supreme Court of the United States in taking jurisdiction in this case in XII Va. Law Register, p. 1045. The Supreme Court of the United States now holds that whilst the former statute of Congress expressly provided that an employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in failure to provide automatic couplers was brought to his notice, nevertheless there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not, for that reason, absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employees. Krause *v.* Morgan, 53 Ohio St. 26, 40 N. E. 886; Holum *v.* Chicago, M. & St. P. R. Co., 80 Wis. 299, 50 N. W. 99 Grand *v.* Michigan C. R. Co., 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; Taylor *v.* Carew Mfg. Co., 143 Mass. 470. 10 N. E. 308.

And such was the holding of the court of appeals of the eighth circuit, where the statute now under consideration was before the court. Denver & R. G. R. Co. *v.* Arrighi, 63 C. C. A. 649, 129 Fed. 347.

So the court now holds—sustaining the Supreme Court of Pennsylvania, to which the case had again been taken—that Schlemmer's personal representative could not recover, because he attempted to make a coupling of cars in a dangerous way, when a safer way at the time called to his attention and repeated cautions were given him at the very time he was engaged in his work. In regard to the Federal question as to which Brewer, J., dissented so vigorously when the case was first before the court (a dissenting opinion which we have always thought unanswerable) the court through Mr. Justice Day says:

"As we have said, the Federal question in the record, and the only one which gives us jurisdiction is: Did the trial and judgment deprive the plaintiff in error of the rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative."

It is well to note that by the 3rd section of the act of April 22, 1908, 35 Stat. at L. 65, chap. 149 U. S. Comp. Stat. Supp. 1909, p. 1171, amending the employers' liability act, no employee injured or killed to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

This amendment we think was passed to meet just such cases as the Schlemmer case.

In the case of Chicago, B. & O. R. Co. *v.* United States, May 15th, 1911, the question was whether the Acts of March 2nd, 1893, April 1, 1896 and March 2nd, 1903, impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. And whether the carrier engaged in moving interstate traffic could escape the penalty prescribed for a violation of the act, in the particulars just mentioned, by showing that it

had exercised reasonable care in equipping its cars with the required coupler, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped.

The Railway Company contended that "a reasonable construction of the safety appliance act is that if the railroad company equipped all its cars with uniform and standard height drawbars when such cars were first built and turned out of the shops, then that *thereafter* the defendant is only bound to use *ordinary care* to maintain such drawbars at the uniform and standard height mentioned in the testimony." Counsel for the Government contended on the strength of St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, that "under the safety appliance act it is immaterial whether the defendant had notice of the defect, or had used ordinary care to prevent this and similar defects from arising," and that "the railroad is liable under the act, unconditionally, for any violation of its provisions," citing Southern R. Co. *v.* Carson, 194 U. S. 136, 48 L. Ed. 907, 24 Sup. Ct. Rep. 609; United States *v.* Atlantic Coast Line R. Co., 135 Fed. 122; United States *v.* Great Northern R. Co., 150 Fed. 229. It is thus seen that whether the act of Congress imposed an absolute duty upon the carrier in the matter of the required safety appliances, or whether knowledge or diligence on its part was an ingredient in the act condemned, was a question distinctly presented to the court by the assignments of error and by counsel on both sides.

The Supreme Court held that the duty of the Railway Company in situations where the Congressional law is applicable is *not* that of exercising *reasonable care* in maintaining the prescribed safety appliance in operative condition, but is absolute, and that the common-law rules in respect of the exercise of reasonable care by the master, and of the non-liability of the master for the negligence of a fellow servant were superseded by the statutes referred to, and quotes with approval Greenleaf on Evidence, 16th Ed. Sections 21, 26 and notes:

> "Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law

enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases, seems to bind the party to know the facts and to obey the law at his peril."